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No. 671

Office-Supreme Court, U.S.
FILED
MAR 4 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

A. D. JUILLIARD & CO., INC., *Petitioner*,

v.

JAMES W. JOHNSON, Collector of Internal Revenue for the Third District of New York, *Respondent*.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

STEPHEN AILES
PAUL F. MICKEY
WILLIAM C. HILL
MARTIN D. EILE
Attorneys for Petitioner

Of Counsel:

STROOCK & STROOCK & LAVAN
61 Broadway
New York, N. Y.

STEPTOE & JOHNSON
1100 Shoreham Building
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The Government's Position

As pointed out at page 6 of the Petition for Certiorari, the Court of Appeals in its opinion (Pet. 11a) asserts that the settlement in this case was a lump sum settlement, no part of which could "be said to have been paid for any specific violation." The presence of this statement in the opinion is advanced by the Brief in Opposition as a complete and adequate basis for the denial of certiorari in this case.

The Court of Appeals made no effort to state the legal effect of that assertion on the question of deductibility in this income tax case, although a serious legal

question is presented.[1] Instead, possibly in recognition of the absence of any factual basis in the record for such a finding, it passed directly to the broader proposition that inquiry here into the nature and purpose of the payment was barred solely because the settlement was made with the Federal Government. Brushing aside the District Court's erroneous holding that this particular settlement had taken on the character of a judicial act, the Court held:

> . . . that the appellant is precluded from now urging that the full amount of $410,219.31 was not actually paid for admitted violations of the Act, because it voluntarily settled on the basis of that sum.
>
> It is conceded by Juilliard that insofar as it might seek to recover the sum of $132,223.62 from the OPA "that book is closed." It is nonetheless closed in our opinion, when it seeks to recover indirectly part of that sum by way of a tax exemption, when in order to do so it must reopen for consideration the question of its liability to the Administrator at the time of the compromise. (Pet. 12a).

Because the test for deductibility thus employed (1) is in conflict with the holding of this Court in *Tank Truck Rentals, Inc.* v. *Commissioner*, 356 U. S. 30, (2) discourages compromises of litigation with the Federal Government, (3) conflicts with decisions in the First Circuit and the Court of Claims, and (4) improperly makes deductibility depend on whether

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[1] See Lustig v. United States, 138 F. Supp. 870 (1956), discussed at page 12 of the petition for certiorari, in which the Court of Claims holds that the circumstances of a lump sum settlement and the manner in which the amount was arrived at must be inquired into in order to determine deductibility of a part of the payment.

the compromise is with a State or the Federal Government, we sought certiorari.

Respondent's Brief in Opposition makes no effort whatsoever to defend this principal holding or to contest what we have stated the significance and effect of it to be. Instead, respondent is content to point to the lump sum settlement basis for the holding of the Court of Appeals. Nor does respondent attempt to support this alternative holding. It merely states that "*if*" it is true "the result reached is the only possible one." And this is a legal conclusion for which no authority is cited, no reason stated.

Respondent therefore does not attempt to support the propriety of the decision below on *either* ground. Its position thus may be paraphrased as follows: "Even though the Court of Appeals held, as petitioner contends, that a settlement of a Government claim may never be dissected to determine deductibility of a payment for tax purposes (a legal conclusion which we do not defend), it could have based its decision solely on its finding that this was a lump sum settlement (a factual conclusion which we also do not defend). Since the second holding involves no issue of general importance, certiorari should be denied."

Regardless of what it could or might have done, the fact is that the Court of Appeals did not base its holding on or limit its holding to the lump sum settlement point. Its decision, unless reversed, plainly stands as a precedent for the broader proposition, quoted above and extensively argued in the opinion, that no settlement of a Federal Government claim can be reopened to determine deductibility for income tax purposes, since a deduction would constitute an indirect recovery of money which could not be recovered di-

rectly. For certiorari purposes, the point made in respondent's brief must be the proposition that, on review, this Court would not reach the broad proposition for which this case stands.[2] Yet, even if the Court of Appeals had made this point an alternative basis for decision, nothing could be clearer than that this Court on review would find the record so completely devoid of support for this finding as to require the Court to pass directly to the main issue in this case. In fact, we strongly suspect that on review the Government would be no more disposed to defend, on the record, this finding than it was in its Brief in Opposition.

The Lump Sum Settlement Holding and the Record

It should be noted at the outset that the majority's finding, on which the Government now relies, in effect overrules the District Court and adopts a position never urged upon it by the Government, much less by petitioner. The finding cannot be reconciled with the view of the facts adopted by the District Court and advocated by the Government throughout.

There is no dispute over the manner in which the settlement was reached by the parties. Contemporaneous memoranda prepared by counsel handling the negotiations for each side were placed in the record, and petitioner's counsel testified concerning these events at the trial. There was no dispute between the

[2] We recognize that the Court will deny certiorari in a case involving a point worthy of certiorari if it is apparent that the case on review would be decided on other grounds and that the certiorari question would not be reached. Stern & Gressman, Supreme Court Practice, 2nd Edition (1954), p. 112.

parties over these events and the trial judge made specific and clear findings with respect to them.

The nature of the settlement as it emerges from the trial court's findings, all amply supported, in fact uncontroverted, on the record, is as follows:

First, the Government contended and the trial judge found (Finding 31, R. 19a-21a)[3] and relied upon the fact (Opinion, R. 39a, 40a) that this was a treble damage settlement. This can only mean that the amount paid constituted a trebling of all overcharges for which OPA wished to hold petitioner responsible. That a treble damage settlement is the very antithesis of a lump sum settlement was emphasized by the Government's counsel at trial when, in cross-examining the attorney who had represented petitioner at settlement, he stated the Government's then position:

> Q. As a matter of fact, a settlement was negotiated on the basis of trebling something and not on a lump sum basis?
>
> A. That is right, it was on the basis of trebling some $136,000, and they came up with a figure of $410,219. (R. 192a)

Second, it is clear that a settlement formula was agreed upon by the parties without regard to the ultimate figure to be reached. As stated by the Trial Judge in the course of his Finding 29:

> Recognizing the vagueness of the original Regulation, MPR 163, which went into effect June 22, 1942, the obviously low markup which Juilliard received under the "new" fabric formula appli-

[3] Page references in this reply, designated "R", refer to the Appendix to Appellant's Brief before the Court of Appeals, filed with the Petition for Certiorari.

cable to it under the Regulation, adjustments were tentatively agreed upon by OPA and Juilliard counsel. The whole period under MPR 163 prior to Amendment 4 was eliminated from consideration and the company-wide profit ratio, used in the "new" fabric formula, was increased by Juilliard to use the Stottville markeup (about 20%) instead of the company-wide markup (about 9.8%), so as to eliminate the adverse effect of the 1941 strike at the Providence mill. *As the result of this tentative agreement, the overcharges would have been $26,000, trebled to $78,000. Fabric A-2391 was not included.* (Emphasis added). (R. 19a).

Third, it is clear that, *after* this tentative agreement was reached, an error in computing the costs on fabric A-2391 was discovered, and that overcharges equal to $110,049.48 were *added* to the $26,000 figure, making single damages of approximately $136,000 and bringing the trebled total from approximately $78,000 to the figure of $410,219.31 which petitioner paid. (Finding 30, R. 19a).

Thus it is clear, as the Trial Court held and as the Government has contended up to now, that the amount paid was intended by the parties to be related to specific violations. Purely as a matter of chronology, there can be no doubt that the overcharges on fabric A-2391 are directly responsible for a specific portion of the amount paid in settlement. The mistake in computing this amount is accordingly directly responsible for a specific portion of the settlement. Judge Hincks, in dissent, convincingly demonstrated the truth of this proposition. (Pet. 15a)

On the record of this case, the holding by the majority of the Court of Appeals that no part of the total

sum of $410,219.31 paid in settlement of this civil suit can be said to have been paid for any specific violation cannot be explained, much less justified. The contention, quoted in part in the Brief in Opposition, that "the very motive for the settlement was the uncertainty of establishing specific overcharges on many of the items;" ignores the fact that the record contains no reference to any negotiation concerning the individual ceiling price of any item. The remainder of that sentence, "the alleged mistake which appellant here urges, was an item in issue on the compromise, and may not now be used as a reason to dissect it," (Pet. 13a) can never be reconciled with the admitted fact that the mistake in question was discovered some months after the settlement was completed and the money paid (Finding 38, R. 26a).[4]

We submit that the lump sum holding, if that it is, would never prevent this Court from reaching the main legal question in this case. Indeed, if it were the only basis for the decision below, this Court might well wish to consider whether or not that question itself should not be reviewed on certiorari because in ignoring the factual determinations of the Trial Court and in making these completely unsupportable findings, the Court of Appeals "has so far departed from the

[4] It cannot be argued that petitioner *agreed* to give up the right to dissect this settlement at a later date. Although the Brief in Opposition states (page 4) that the settlement stipulation provided that it was binding "for all purposes, and not merely for this action," this statement is incorrect. As was pointed out below when the Government made this contention, the quotation is taken from another stipulation (filed with the Government's brief below at page 27a) which set the maximum prices to be employed by petitioner for future sales and which had nothing whatsoever to do with the money damage settlement.

accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." (Rule 19, Revised Rules of the Supreme Court)

Conclusion

We submit that the case for certiorari stated in the petition stands unchallenged. The Brief in Opposition does not seek to meet it. It merely urges the untenable proposition that certiorari in this case should not be granted because there is an alternative, albeit unsupportable, basis for the decision below.

Respectfully submitted,

STEPHEN AILES
PAUL F. MICKEY
WILLIAM C. HILL
MARTIN D. EILE

Attorneys for Petitioner

Of Counsel:

STROOCK & STROOCK & LAVAN
61 Broadway
New York, N. Y.

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